80-2054

NO. _____

IN THE

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Supreme Court of the United States

OCTOBER TERM, 1980

JOHN BUETTNER-JANUSCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether agents of the Drug Enforcement Administration can engage in a planned, warrantless entry into a university professor's scientific laboratory, seize chemicals, notes, and scientific equipment, all on the unstated "implied consent" of third parties who had lawful access to the laboratory but did not have authority over the laboratory in their own right.

2. Whether, in court, the Government can justify the planned, warrantless entry, search and seizures on the basis of alleged consents upon which the agents did not in fact rely at the time of the entry.

3. Whether a research scientist at a university has an expectation of privacy concerning the nature and composition of chemical substances found in closed jars stored in sophisticated scientific equipment designed to keep those substances secure and safe, and whether the scientist loses that expectation of privacy simply because an observer walking through the laboratory may be able to see what the substances look like.

4. When, by using their natural senses, government agents can discern only the physical appearance of substances seized from within closed containers stored in scientific equipment in a university laboratory, may the agents augment their natural senses by subjecting these substances to chemical analysis in a Government laboratory without first obtaining a search warrant?

5. When government attorneys represent to a subject of a grand jury investigation that they will respect his expressed desire to the help of his retained counsel while they are questioning him about the case, may these same attorneys, at the same time, dispatch informants to conduct interviews surreptitiously with the subject in the absence of his counsel and then use the fruits of these surreptitious interviews against the subject in court?

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JOHN BUETTNER-JANUSCH,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Dr. John Buettner-Janusch, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit entered on April 6, 1981.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is printed in Appendix A hereto and is published at - - F. 2d - - (2d Cir. 1981). The opinions of the United States District Court for the Southern District of New York are printed in Appendices B, C, D, and E hereto. The opinion dated October 29, 1980, is published at 500 F. Supp. 1285 (S.D.N.Y. 1980).

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 6, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. * * *"

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Preliminary Statement

Dr. John Buettner-Janusch was indicted on October 3, 1979, and charged in a six-count indictment with: (1) conspiracy to manufacture and distribute certain controlled substances (Count 1), [21 U.S.C. § § 812, 841(a), 841(b)(1)(B) and 841(b)(2)]; (2) manufacture and distribution of methaqualone (Count 2), and cylert pemoline (Count 3) [21 U.S.C. § 812, 841(a)(1), 841(b)(1)(B) and 841(b)(2), and 18 U.S.C. § 2]; (3) conspiracy to obstruct a criminal investigation (Count 4), [18 U.S.C. § § 371, 1503]; and (4) knowingly making false statements to government investigators (Counts 5 and 6), [18 U.S.C. § 1001].

Beginning on June 30, 1980, Dr. Buettner-Janusch was tried before the Honorable Charles L. Brieant and a jury. At the end of the Government's case, Judge Brieant entered a judgment of acquittal on Count 4 (conspiracy to obstruct justice). On July 18, 1980, the jury returned a verdict of not guilty on Count 3 and guilty on Counts 1, 2, 4 and 6.

On November 14, 1980, Dr. Buettner-Janusch was sentenced to a term of imprisonment of five years (concurrent terms of two years imprisonment on Counts 5 and 6, to be followed by concurrent terms of three years imprisonment on Counts 1 and 2). On April 6, 1981 the United States Court of Appeals for the Second Circuit affirmed the conviction.

Background

At the time that the investigation in this case began, Dr. Buettner-Janusch was a distinguished academic scientist whose work had bridged the fields of anthropology and chemistry (Tr. 1542).* He has written extensively about the role of chemistry and genetics in the evolution of primate behavior. These studies have revolutionized many aspects of anthropology (Tr. 1544). During the 1970's, Dr. Buettner-Janusch became very interested

*"Tr." refers to the trial transcript.

in how the introduction of chemicals into lemurs could modify their behavior (Tr. 1509, 1543). This interest was heightened by the work of one of his former graduate students who had observed abnormal behavior patterns in female lemurs after they gave birth. In order to test some of his hypotheses, Dr. Buettner-Janusch suggested that chemicals could be given to the female lemurs to block the secretion of certain hormones after birth. His preparatory work on these experiments, as well as his efforts to fund the project, were begun well before the government investigation commenced (Tr. 1613, 1799).

The Investigation That Led To The Indictment Of Dr. Buettner-Janusch

A. NYU builds a laboratory especially for Professor Buettner-Janusch.

In 1973, Dr. Buettner-Janusch was lured from Duke to NYU and made chairman of the Anthropology Department. The District Court found that an important attraction for Dr. Buettner-Janusch was the laboratory which would be constructed especially for his use (A. 25a).* At the center of this case is one piece of equipment which Dr. Buettner-Janusch moved from Duke to NYU, his fume hood. The fume hood is a glass walled enclosure designed to prevent toxic gases from escaping into the laboratory.** All of the controlled substances seized during the Government's raid of Dr. Buetter-Janusch's laboratory were taken from closed jars found in the fume hood.

Because of its importance to the work of Dr. Buettner-Janusch's laboratory, there were rules concerning the use of the fume hood. No one was permitted to open its door or touch or remove any of its contents without approval of the person whose experiment was then being conducted (A. 670, 698a). This practice accomplished two goals. First, it insured that there

*"A" refers to the Joint Appendix filed in the Court of Appeals.

**A photograph of Dr. Buettner-Janusch's fume hood is included as Appendix F hereto.

would be only a limited exposure to health-endangering substances. Second, the practice was designed to safeguard the efforts of the researcher from mishaps which could destroy years of research (A. 607a, 698a, 314a).

As a research scientist in a university, Dr. Buettner-Janusch had expectations of privacy concerning his laboratory and his work. He expected that the physical integrity of his laboratory would be respected. More important, he expected, as any research scientist would (see testimony of Biology Professor Gunther Stotzky, A. 729-37), that the integrity of his research would be respected – that is, that there would be no inspection, without his permission, of his notes, laboratory books, research articles, scientific documents, and chemicals, any of which might indicate the nature of the research being conducted.

Of course, because Dr. Buettner-Janusch's research required teams of workers, people other than Dr. Buettner-Janusch had access to and used the laboratory. However, that access and use were controlled by Dr. Buettner-Janusch (A. 690a, 698a). For example, Richard Macris had keys to the laboratory. He was an undergraduate student of Professor Clifford Jolly but worked as an assistant in Dr. Buettner-Janusch's laboratory under the latter's supervision. Macris left the laboratory in mid-April 1979 claiming to have contracted mononucleosis. He took an unofficial leave of absence from the University (A. 225a).

Clifford Jolly, Professor of Physical Anthropology at NYU since 1968, also had keys to Dr. Buettner-Janusch's laboratory (A. 383a). Jolly had his own laboratory in Room 409 of Rufus Smith Hall, next door to Dr. Buettner-Janusch's laboratory. Because Room 409 had no direct means of access to the passenger elevator, Jolly needed keys to Dr. Buettner-Janusch's laboratory not so that he could share the laboratory, but so that he could walk from the passenger elevator through Dr. Buettner-Janusch's laboratory in order to reach his own workplace in Room 409 (A. 230a, 384a).

Dr. Buettner-Janusch's laboratory and Jolly's laboratory were financially and functionally independent (A. 691a). Each laboratory had separate equipment (A. 692a-694a). Dr. Buettner-Janusch and Jolly had separate research projects

(A. 703a). Although on occasion Jolly and his research assistants used some of the less sophisticated equipment in Dr. Buettner-Janusch's laboratory (A. 393a), they "rarely" used any of the advanced equipment Dr. Buettner-Janusch brought with him from Duke (A. 607a). With respect to the fume hood, Jolly testified that he could not recall a single instance in 1979 when he had used it (A. 607a).

B. Macris and Jolly begin stealing chemicals, equipment and papers from Dr. Buettner-Janusch's laboratory.

In December 1978, Dr. Buettner-Janusch told Richard Macris, who had worked in the laboratory since 1977, that there was no more money in the Salary Account and that Macris could no longer be paid (A. 223a). Shortly thereafter, according to Macris, he became suspicious that certain chemicals in Dr. Buettner-Janusch's laboratory could be used to manufacture controlled substances (A. 202a). In early February 1979, Macris told his suspicions to Jolly (A. 202a). The two then began to spy on Dr. Buettner-Janusch, to take surreptitious photographs of the laboratory and of the contents of laboratory notebooks, to scavenge the wastepaper baskets, and to steal papers, chemicals and equipment from places throughout Dr. Buettner-Janusch's laboratory, including the fume hood (A. 293a, 461a, 467a, 469a, 471a). Jolly stole a key to Dr. Buettner-Janusch's storage room in the basement of Rufus Smith Hall and subsequently searched it (A. 425a).

Macris and Jolly spied for several months before contacting law enforcement officials. On May 2, 1979, through intermediaries, Macris and Jolly arranged to have the chemicals stolen from Dr. Buettner-Janusch's laboratory tested by the Drug Enforcement Administration ("DEA") (A. 358a). An understanding was reached that Macris and Jolly would not "have to worry about prosecution" (A. 360a). Government officials took the stolen chemicals and, without obtaining judicial approval, subjected them to an intensive analysis (A. 370a). Approximately one week later, the Government reported that the chemicals stolen by Macris and Jolly contained controlled substances (A. 349a).

C. Government agents break into Dr. Buettner-Janusch's laboratory after deciding not to obtain a warrant.

On May 16, 1979, after consulting with the President and the General Counsel of NYU, Macris and Jolly met with government officials. The government officials suggested a search warrant for Dr. Buettner-Janusch's laboratory but then made a deliberate decision, at the urging of NYU's counsel, not to obtain one (A. 132a-133a, 214a). NYU wanted to be saved the "notoriety" that would result from filing a search warrant in court (A. 65a). So, the officials decided to make a warrantless search on the basis of NYU's consent. Neither Macris nor Jolly was asked to consent (A. 258a, 421a). At the request of the government attorney, they did agree to "go along" with agents on the raid (A. 421a).

The next day, May 17, NYU's counsel met with the President of NYU, then called an Assistant United States Attorney and told her that "the University" would consent to the search of Dr. Buettner-Janusch's laboratory (A. 135a). After receiving this consent, the government officials decided to wait until nighttime to make sure that Dr. Buettner-Janusch would be out of his laboratory. At about 10 p.m., thirty (30) hours after the Government had been informed of the alleged manufacture of controlled substances in the laboratory (A. 464a), six DEA agents entered the laboratory together with Richard Macris, his brother Robert Macris, and Jolly. They opened the door with Jolly's key (A. 465a, 492a).

DEA chemist Jeffrey Weber was in charge of deciding what in the laboratory should be seized (A. 756a). While the agents were entering enclosed areas of the laboratory and removing things from them, Weber noticed on a lab table a plastic container tightly closed with a screw-on top (G.X. 106; A. 776a).* This container apparently had been removed from the fume hood by someone in the raiding party.** The container was

*"G.X." refers to Government Exhibit.

**The record is unclear about who in the raiding party removed the container. Danny Cornyetz, the director of Professor Buettner-Janusch's laboratory, testified that he placed the container in the fume hood before he left the laboratory at about 5:00 P.M. on the day of the break-in. (A. 667a; Tr. 420).

translucent and not transparent, and by shaking it, Weber could tell only that it contained a "clumpy" powder (A. 775a). The container was labeled "starch", but because starch is not "clumpy", Weber thought it contained something else (A. 775a). He needed more information to determine what the contents were, so he unscrewed the top of the container. He smelled toluene, a common laboratory solvent that could be used to make methaqualone. This smell was the "determining factor" in Weber's decision to seize G.X. 106 (A. 776a).

Weber then turned his attention to the other containers in the fume hood (A. 768a). He saw four plastic containers which were tightly closed with screw-on tops (G.X. 103A and B and G.X. 104A and B). Weber also saw two evaporating dishes (G.X. 105A, 105B) with labels indicating melting points close to that of methaqualone. These dishes were covered with silver foil (A. 774a, 1240a).

Weber was curious about the contents of the four plastic containers and wanted to learn more about them (A. 773a). He had seen a notebook in the laboratory but had not yet read its contents (A. 761a). Now, after he had already opened G.X. 106, he read the [illegible] of the notebook and saw that it contained a series of numerical entries (A. 761a). These entries corresponded to labels on the containers remaining in the fume hood (A. 771a).

When Weber saw the containers, he had no more than a suspicion that there was methaqualone somewhere in the laboratory and not necessarily in the four plastic containers. According to Weber, visual examination of the containers told him little about their contents (A. 769a, 770a). Weber testified that he interpreted the notations in the notebook as representing the melting points of the substances in the containers (A. 771a). The melting points in the notebook, however, were up to 100° Celsius higher than the melting point of methaqualone (A. 761a, 771a-773a).* Macris and Jolly had

*According to Weber, the melting point of methaqualone is 115° C. (A. 772a). The melting points recorded in the notebook for the substances in G.X. 103A, G.X. 103B, G.X. 104A and G.X. 104B ranged from 185° to 220° C. (A. 771a). There are 275 organic compounds that have the melting points recorded in the laboratory notebook. CRC, *Handbook of Chemistry and Physics*, 645, 648 (1974).

joined the raiding party to help direct the search, but they did not identify these particular jars as containing controlled substances. Accordingly, Weber decided that he needed more information about the substances in the containers before he could decide whether to seize them. Therefore, he unscrewed the tops of the containers, peered into them and smelled their contents (A. 774a). He again smelled toluene (A. 775a). He said that he did not smell toluene until he opened the containers (A. 775a) and that the smell of toluene was the "determining factor" in his decision to seize the four containers (A. 776a).

Even with the information gathered in the raid, including the smell of toluene, Weber still was not certain whether there was methaqualone or any other controlled substance in any of the containers (A. 767a). Therefore, Weber decided that the chemicals had to be seized, taken to a government laboratory, and subjected to extensive analysis (A. 773a). The agents gathered up their seizures and left (A. 497a-499a, 640a, 777a). On the way out, the agents ripped off the lock and frame of the laboratory door with a tire iron (A. 261a-266a, 500a). They did so to make the break-in look to Dr. Buettner-Janusch as if there had been a burglary by someone who did not have a key (A. 262a). The agents thus shielded Jolly and Macris so that they could continue as spies.

In all, the agents seized seven containers of chemicals from the fume hood, twelve containers of chemicals from the closed cabinets under the fume hood, four containers of chemicals from the cold room, one container of chemicals from the freezer compartment adjacent to the fume hood, nine containers of chemicals from open areas in the laboratory, a reaction vessel and stand from a table near the fume hood, and a heating mantle rheostat device and separatory funnel from lab carts near the fume hood and took photographs of notes in the laboratory (A. 794a-798a, 497a-499a). The Government conceded that most of the chemicals seized were not controlled substances (A. 790a-794a). All of the methaqualone found in the laboratory on May 17 came from the containers taken from inside the fume hood (A. 790a-794a).*

*Nonetheless, almost all of the items seized on May 17 were used by the Government at trial.

Since the government agents were not acting pursuant to a search warrant, they made no return and did not notify Dr. Buettner-Janusch that his laboratory had been subjected to a search and that his materials had been seized. Instead, the agents simply kept the materials for some time, and then, again without judicial authorization, subjected all of the seized substances to a chemicals analysis, a much more intensive and thorough search than the one Weber had conducted when he looked at the chemicals and opened the jars in the laboratory (Tr. 1240).

D. The Government continues its undercover investigation and attempts to elicit statements from Dr. Buettner-Janusch.

After the break-in, government attorneys attempted to further their investigation by obtaining statements from Dr. Buettner-Janusch, both overtly and covertly. During the overt attempts, government attorneys repeatedly told Dr. Buettner-Janusch that they would deal with him through the lawyer they knew he had retained and would honor his right to the help of that lawyer. They did so by issuing grand jury subpoenas and attaching forms which informed Dr. Buettner-Janusch that he had the right to consult with his attorney outside the grand jury room (A. 799a). When Dr. Buettner-Janusch appeared before the grand jury, government attorneys repeated this advice (A. 803a, 806a). When Dr. Buettner-Janusch made it clear that he would not give statements to the grand jury, while his retained counsel was not present, arrangements were made for Dr. Buettner-Janusch to appear in the United States Attorney's Office, twice, with his counsel present (A. 812a, 934a). By permitting the lawyer to be present during these interviews, and by telling Dr. Buettner-Janusch that he had an "absolute right" to consult with his attorney in private (A. 934a), the government lawyers communicated that they would respect his desire and honor his right to the help of his lawyer.

While the government lawyers were making these explicit and implicit representations to Dr. Buettner-Janusch, they were also sending three undercover informers to elicit statements

from him in the absence of his lawyer. In all, government attorneys supervised at least ten surreptitious interviews with Dr. Buettner-Janusch (A. 801a-1240a). These surreptitious interviews (without counsel) spanned a period of six weeks and were interspersed with the many representations that the Government would honor his right to the help of his lawyers.

In their recorded conversations with Dr. Buettner-Janusch, the government informers were not simply passive listening posts. On the contrary, they initiated all of the conversations after the first one on May 23 (A. 277a-280a). The informers questioned Dr. Buettner-Janusch about the alleged illegal manufacture of controlled substances, the very subject matter for which he retained an attorney. When conversations lagged or when Professor Buettner-Janusch was not incriminating himself sufficiently, the informers made up stories to prod him. (See, e.g., A. 1162a, A. 1220a, Affidavit of AUSA Roanne Mann filed November 14, 1979, ¶ 15).

By knowingly circumventing Professor Buettner-Janusch's counsel, government lawyers obtained statements that were critical to the Government's case. A major portion of the prosecutor's summation was taken up with a discussion of the statements Dr. Buettner-Janusch made to the government informants in the absence of counsel (Tr. 1949-1956). In addition, because two of the informants represented that they were engaged in a joint defense with him, they were able to elicit from him secrets of his defense and sometimes even confidential attorney-client communications. (See, e.g., A. 1090a, 1164a, 1204a, 1210a, 1225a, 1229a, 1235a).

The Opinions Below

A. The entry into the laboratory.

The Government's principal argument in the District Court was that, as the owner of the premises in which the laboratory was located and as employer of Dr. Buettner-Janusch, NYU had authority to break down the door in order to enter the laboratory. Therefore, according to the Government, NYU administrators also had the right to grant the

Government permission to make forcible entry. The District Court rejected this argument (App. 78) but upheld the entry nonetheless on the basis of an unstated "implied" consent of Macris and Jolly (App. 84).* The Court of Appeals upheld the entry on the same ground (App. 3).

In deciding that Macris and Jolly could lawfully give consent to the entry into Dr. Buettner-Janusch's laboratory, the courts below applied the test stated in *United States v. Gradowski,* 502 F.2d 563, 564 (2d Cir. 1974) *(per curiam).* Under *Gradowski,* "[C]onsent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it *or permission to exercise that access, express or implied,* alone validates the search." 502 F.2d at 564 (emphasis supplied). The courts below reasoned that because Macris and Jolly had keys to the laboratory, as well as Dr. Buettner-Janusch's permission to enter his laboratory, they had authority to consent to the Government's warrantless entry into the laboratory (App. 3, 84). In substance, the courts below concluded that lawful access to Dr. Buettner-Janusch's laboratory was all that was required to empower Macris and Jolly to consent to the entry.

B. The search of the fume hood and the closed containers.

The courts below upheld the search of the fume hood on the basis of the same unstated "implied" consent of Macris and Jolly that was held to justify the entry into the laboratory. The courts concluded that since Dr. Buettner-Janusch had not exercised his "right" to exclude Macris or Jolly from the fume hood, he lost his legitimate expectation of privacy in it (App. 13, 96). In any event, since Macris and Jolly had "implied" permission to use the fume hood, they had authorization to consent to the government's warrantless search of it (App. 14). The courts below found no significance in the uncontradicted testimony concerning the rules limiting access to the fume hood to the person whose experiment was being conducted or in

*"App." refers to the appendix hereto.

Jolly's testimony that he could not recall using the fume hood at all in the year 1979.*

The District Court did not find that the unstated "implied" consent to enter the laboratory extended to the opening of the closed containers in the laboratory. In suppressing G.X. 108, a container found in the freezer, the District Court explicitly rejected the government's claim of consent (App. 126). Nonetheless, the District Court upheld the opening and seizure of the closed containers taken from the fume hood on the ground that the substances in these containers were in "plain view". Even though Weber's observations in the laboratory did not tell him what was in the jars, the District Court concluded that these observations, together with his knowledge that the chemicals stolen by Macris and Jolly contained methaqualone, made it reasonable for Weber to infer that these particular jars also contained methaqualone (App. 124). The Court of Appeals adopted a similar analysis and found that the contents of the jars were in "plain view" in part because Weber was aware of what had been stolen by Jolly and Macris (App. 15).**

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*The Court of Appeals also said it was agreeing with the District Court's conclusion that Dr. Buettner-Janusch forfeited his expectation of privacy in all the enclosed spaces in the laboratory by allowing several people access to them (App. 13). Although the District Court expressed doubts about whether Dr. Buettner-Janusch had an expectation of privacy in the laboratory (App. 139), it could not have based its decision on these doubts because it suppressed some evidence seized from an enclosed space in the laboratory (App. 127). In the District Court, the Government conceded that Dr. Buettner-Janusch had a legitimate expectation of privacy in his laboratory (App. 139).

**In its discussion of the one container which was suppressed by the District Court, the Court of Appeals appeared to say that, in its view, the initial unstated "implied" consent to enter the laboratory also extended to opening closed containers which had been removed from enclosed spaces within the laboratory (App. 15-16).

C. The analysis of the chemicals.

Both the District Court and the Court of Appeals held that the Government could, without a warrant, subject two groups of chemicals to analysis in a government laboratory. (One group was stolen by Jolly from Dr. Buettner-Janusch's laboratory, and the other was seized by the DEA agents during the raid). The Court of Appeals held that *Walter v. United States*, 447 U.S. 649 (1980) did not apply to the analysis of either group (App. 16).

First, the Court of Appeals stated that Dr. Buettner-Janusch had no expectation of privacy in the chemicals seized from the laboratory because their appearance was exposed to view by the "casual observer" (App. 16). Second, with respect to the samples stolen by Jolly, the Court of Appeals noted that the DEA obtained them from individuals "who had access to [the samples] and permission to exercise that access" (App. 16). The Court of Appeals apparently concluded, without citation of legal authority or reference to the record, that someone with permission to exercise access to someone else's materials also has the right to take those materials, give them to the Government and consent to a much more thorough search of them than the person could or did perform.

D. The surreptitious interviews in the absence of counsel.

The District Court held that the surreptitious tape recordings were admissible because Dr. Buettner-Janusch was neither under indictment nor in custody when they were made (App. 53). The District Court ruled that the government lawyers did not violate Disciplinary Rule 7-104(A)(1)* of the American Bar

*Disciplinary Rule 7-104(A)(1) states:

"During the course of his representation of a client a lawyer shall not:

> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Association's Code of Professional Responsibility because the lawyers did not conduct the interrogations themselves (App. 56). Although this issue was urged upon the Court of Appeals, it did not discuss the question.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S TEST FOR DECIDING WHEN THE CONSENT OF "THIRD PARTIES" VALIDATES WARRANTLESS SEARCHES AND SEIZURES GIVES INSUFFICIENT WEIGHT TO IMPORTANT INTERESTS PROTECTED BY THE FOURTH AMENDMENT AND CONFLICTS WITH THIS COURT'S DECISION IN UNITED STATES V. MATLOCK AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

This case presents important questions about the doctrine of third-party consent. This is a doctrine which deserves the careful attention of the Court. First, it is a doctrine which may be used, as it was in this case, to plan a deliberate avoidance of the warrant requirement.* Second, it is a doctrine which removes from citizens their own control over those privacy interests which are protected by the Fourth Amendment and puts that control in the hands of "third parties". Third, unless it is strictly contrued, the doctrine of third-party consent may be used, as it was in this case, to justify intrusions well beyond either the expression of consent or the authority of those consenting. For example, here Jolly's and Macris' decision to

*See e.g., *McDonald v. United States*, 335 U.S. 451 at 455-56 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443, 471 n. 27; *United States v. United States District Court*, 407 U.S. 297, 315 (1972). Because of its decision not to obtain a warrant, the Government deprived Professor Buettner-Janusch of the right to have a neutral magistrate pass on the existence of probable cause, the right to have the search and seizure limited by the specific terms of a warrant, the right to a public filing of the warrant and return in court (unless the warrant or return was sealed by proper authority), and the right to an inventory of the items seized pursuant to the warrant. F.R.Cr.P. 41.

"go along" on the raid was used to justify the entry into the laboratory, the search of enclosed spaces within the laboratory, the opening of closed containers taken from within the enclosed spaces, the seizure of large amounts of chemicals, papers and scientific equipment, and the subsequent analysis of these chemicals at a government laboratory.

Finally, there are good reasons why the application of the third-party consent doctrine in this case warrants this Court's particular attention. The Government's search was of an eminent scientist's research laboratory in a major university. The seizures were of chemicals, equipment, and papers used in the laboratory. For good reasons, society does, and should, encourage research scientists to expect that their laboratories and the materials in them will remain private. Failure to respect those expectations will affect how secure scientists can feel in their relations with their colleagues, their students, and university and government officials. Where the government's activities affect such interests, they must be held to a standard of scrupulous exactitude under the Fourth Amendment. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Walter v. United States*, 447 U.S. 649 (1980).

A. The Second Circuit's test for "Third-Party Consent" conflicts with this Court's decision in *United States v. Matlock*.

Following its rule in *United States v. Gradowski*, 502 F.2d 563 (2d Cir. 1974), the Court of Appeals held that Macris and Jolly had authority to consent to the government's warrantless entry into Dr. Buettner-Janusch's laboratory because they had access to the laboratory and permission to exercise that access. This rule, in essence, makes lawful access the basis for authority to consent and thus emasculates privacy interests that exist in many areas, most particularly in workplaces like Dr. Buettner-Janusch's laboratory. See *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968). In any modern law office, dozens of people such as cleaning personnel and clerical staff have express permission to exercise access. Under the *Gradowski* test, all such persons

would have authority to permit a warrantless governmental intrusion into the privacy of the office. Law clerks and secretaries have lawful access to judicial chambers; should such persons be permitted to authorize warrantless governmental intrusions?

The *Gradowski* test, and its application in this case, gives insufficient weight to the most important element of this Court's ruling in *United States v. Matlock*, 415 U.S. 164 (1974). Under *Matlock*, before a third party may consent to a warrantless search, he must have authority over the premises to be searched "in his own right". 415 U.S. at 171 n.7. Neither in *Matlock*, which was decided in 1974, nor subsequently, has this Court explained the meaning of the phrase, "in his own right". Without guidance from this Court, it is not surprising that the courts have dealt with questions of third party consent on an *ad hoc* basis, without analysis, and have reached conflicting conclusions.*

One court that has attempted an analysis has announced a test which conflicts with that of the Second Circuit. In *United States v. Heisman*, 503 F.2d 1284, 1288 (8th Cir. 1974), the Eighth Circuit suggested that third-party consent would be valid only if the third party's interest in the area searched would itself be recognized under the Fourth Amendment. This approach is more consistent with the analytical basis for the third-party consent doctrine than is the Second Circuit's *Gradowski* test. The validity of a third-party's consent is not based on vicarious waiver of the defendant's rights. *United States v. Matlock, supra*, 415 U.S. at 171. Rather, a warrantless search is valid in such cases because a third-party has relinquished *his own* Fourth Amendment interests in the premises. *Id.*, 415 U.S. at 171 n.7. Under this analysis, the issue of whether a third-party has authority to consent to a search depends on whether that person had a protected Fourth

*Compare, e.g., *United States v. Williams*, 523 F.2d 64, 66 (8th Cir.), *cert. denied*, 423 U.S. 1090 (1975) (a landlord may not consent to a search of a tenant's premises, even if the landlord reserved the right of entry), with *United States v. Cook*, 530 F.2d 145 (7th Cir.), *cert. denied*, 426 U.S. 904 (1976) (contra); compare *Bettuo v. Pelton*, 260 N.W.2d 423 (Iowa 1977) (an estranged spouse who has left the marital abode may not consent to a search of the premises), with *United States v. Long*, 524 F.2d 660 (9th Cir. 1975) (contra).

Amendment interest (i.e., a legitimate expectation of privacy) in the place searched.

The Eighth Circuit's approach harmonizes the decisions of this Court while the *Gradowski* test does not. An absentee landlord, even if he has lawful access to the leased premises, does not have a legitimate expectation of privacy in the premises. *Rakas v. Illinois*, 439 U.S. 128 (1978) (a property interest alone is not sufficient to give rise to an interest protected by the Fourth Amendment). Therefore, the landlord could not consent to a warrantless search of the premises. *Chapman v. United States*, 365 U.S. 610 (1961). On the other hand, a joint user of a piece of luggage does have a legitimate expectation of privacy in the luggage, *Arkansas v. Sanders*, 442 U.S. 753 (1979). Therefore, he may consent to a warrantless search of the luggage. *Frazier v. Cupp*, 394 U.S. 731 (1969).

We respectfully urge the Court to review this case in order to consider the conflicting approaches and to articulate standards for deciding when "third-parties" may consent to a search.

B. By upholding the search on the basis of consents not relied upon by the agents who conducted the search, the Court of Appeals reached a decision in conflict with decisions of another Court of Appeals.

The first time the Government suggested that the searches and seizures were justified by the consent of Macris and Jolly was during the pre-trial proceedings, when it appeared that the justification relied on at the time of the entry - - NYU's consent - - might not withstand scrutiny. In upholding the search on the basis of purported consents upon which the Government agents did not in fact rely at the time of the entry (A. 258a, 421a), the Second Circuit has created a conflict with the decisions of the Seventh Circuit. According to the Seventh Circuit, third-party consent should not be allowed to justify a warrantless search unless the officers actually relied on the consent and reasonably believed that the third party "possessed the necessary common authority over the premises to validly consent to the warrantless search". *United States v. Harris*, 534 F.2d 95, 97 (7th Cir.

1976). In *United States v. Glasby*, 576 F.2d 734 (7th Cir. 1978), the defendant's father allegedly consented to a warrantless search of an apartment. The agents who conducted the search, however, did not know of the alleged consent. Since the agents who searched did not act in reliance upon the father's words, the Seventh Circuit held that his alleged consent could not justify the warrantless search. 576 F.2d at 737.

The requirement that officers actually rely on an alleged consent in order to justify a warrantless search is a salutary rule. Officers who wish to dispense with a search warrant and justify a search on the basis of a third-party's consent should be required to make reasonable inquiries to determine whether the third-party actually had authority to consent. The officers should be required to rely in fact on the consent of that party. They should not be allowed to look for justification after the intrusion has already occurred.

II.

THE SECOND CIRCUIT'S DECISION UPHOLDING THE SEARCH OF THE CLOSED CONTAINERS CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS, RELATES TO AN ISSUE THAT IS SUB JUDICE BEFORE THIS COURT AND PRESENTS IMPORTANT ISSUES CONCERNING WHETHER AND WHEN PEOPLE HAVE LEGITIMATE EXPECTATIONS OF PRIVACY IN CLOSED CONTAINERS.

Before and since *Arkansas v. Sanders*, 442 U.S. 753 (1979), courts have been confounded by the question of how to analyze whether and in what circumstances the outward appearance of a container bears upon one's reasonable expectation of privacy in its contents. In a recent *en banc* decision, *United States v. Ross*, No. 79-1624 (D.C. Cir. March 31, 1980) *(en banc)*, one of the dissenting judges collected sixty-nine conflicting decisions on the subject. Opinion of Judge Tamm, pp. 6-10. This Court has granted certiorari to clarify the issue. *People v. Robbins*, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1980), *cert. granted*, 66 L.Ed.2d 838 (Jan. 19, 1981) (argued

April 27, 1981). See Petition for a Writ of Certiorari, Question No. 3 (No. 80-148, p.1).

This case presents a similar question. The Second Circuit held that government agents could, without a search warrant, open jars which contained all of the controlled substances seized on the night of the raid. These jars were designed to protect chemicals and to keep out air, moisture, and the prying senses of uninvited intruders. They were kept in Dr. Buettner-Janusch's fume hood, an enclosed piece of sophisticated scientific equipment designed to store chemicals and to keep secure the results of experiments. No scientist should be expected to do more to safeguard the privacy of his research.

Nonetheless, the Court of Appeals reasoned that Dr. Buettner-Janusch had no reasonable expectation of privacy in the contents of the jars because the DEA chemist "could properly infer [the containers] contained methaqualone from their outward appearance" (App. 15). According to the Second Circuit, the contents of the jars "were, for all practical purposes in 'plain view'," (App. 15). These conclusions by the Court of Appeals represent fundamental errors about the rationale of *Arkansas v. Sanders* and the nature of the "plain view" doctrine.

A person who leaves something in "plain view" gives up his reasonable expectation of privacy because he has exposed to others that which, in court, he claims to be private. Although Dr. Buettner-Janusch may have exposed the appearance of the jars' contents to a "casual observer", that appearance revealed virtually nothing about what Dr. Buettner-Janusch, or any scientist, would have wanted to keep private - - the nature and chemical composition of the substances (A. 729a-37, Testimony of Biology Professor Stotzky). The DEA chemist who conducted the search testified that, even with the other information gathered during the raid, he could not tell what was in the containers (A. 769a). He had first to conduct a search of the jars by opening them and smelling their contents before he even decided that the jars should be seized (A. 775a). Even then, he had to subject the contents of the jars to chemical analysis in a government laboratory before he knew that the powders he has seized were methaqualone (A. 769a).

In finding that the contents of the jars were in "plain view", both the District Court and the Court of Appeals relied heavily on the fact that the DEA chemist knew that samples stolen by Jolly and Macris from Dr. Buettner-Janusch's laboratory had subsequently been analyzed in a government laboratory and were found to contain some methaqualone (App. 8, 15 n. 9). This reliance undercuts the rationale of the plain view doctrine. A person may be said to sacrifice his expectation of privacy in things he knowingly exposes to others. But a person should not be said to sacrifice his interest in privacy based on the fact that, without his knowledge, someone else has stolen substances from his laboratory, given them to government agents who then, without a warrant, subject them to chemical analysis in a government laboratory. The Court of Appeals' conclusion that Dr. Buettner-Janusch did sacrifice his interest in privacy thus conflicts with the decisions of this Court and other courts holding that the "plain view" doctrine applies only if the incriminating nature of the item seized is "immediately apparent" from what one knowingly exposes to others. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *United States v. Clark*, 531 F.2d 928 (8th Cir. 1976); *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979).

III.

THE SECOND CIRCUIT'S DECISION UPHOLDING THE WARRANTLESS SEARCH OF THE CHEMICALS CONFLICTS WITH THIS COURT'S DECISION IN WALTER V. UNITED STATES AND PRESENTS AN IMPORTANT ISSUE CONCERNING WHEN AN AUGMENTATION OF THE NATURAL SENSES AMOUNTS TO A SEPARATE SEARCH.

When DEA agents took the samples stolen by Jolly and the substances seized from Dr. Buettner-Janusch's laboratory and subjected these chemicals to analysis in a government laboratory, they were doing so in order to discover information about the substances which was not, and could not be, discerned through the use of the agents' natural senses. The question

whether and when an augmentation of the natural senses amounts to a separate search requiring a warrant has generated substantial conflicts in both result and analysis.* The Second Circuit's decision in this case conflicts with the reasoning of this Court's latest pronouncement on the subject.

In *Walter v. United States*, 447 U.S. 649, 65 L.Ed.2d 410 (1980), FBI agents had to augment their natural senses (by using a projector) in order to see films, the frames of which were too small to be seen by the naked eye. 65 L.Ed.2d at 415. A plurality of the Court held that this augmentation of the natural senses had to be "characterized as a separate search." *Id.* (Justice Marshall concurred in the result only).

The reasoning in *Walter* should have governed this case. The District Court distinguished *Walter* on the ground that the search in that case was of material possibly protected by the First Amendment (App. 133). However, this case also involves important interests - - namely, the privacy of a university laboratory and of substances used in scientific research. If these interests are recognized, as they must be, then the search of these chemicals to determine whether they were illegal contraband or whether instead they were protected research is no different from the search of the films in *Walter* to determine whether they were unprotected illegal pornography or protected expression.

The Court of Appeals held that *Walter* did not apply because the contents of the containers had already been exposed to the "casual observer." One California court has

*E.g., *compare Jones v. Latexo Independent School Dist.*, 499 F. Supp. 223 (E.D. Tex 1980) (use of a "sniffer dog" is a search within the meaning of the Fourth Amendment); *with, United States v. Solis*, 536 F.2d 880 (9th Cir. 1976) (contra); *compare United States v. Michael*, 622 F.2d 744 (5th Cir. 1980) (attachment of electronic "beeper" to automobile is a search within the meaning of the Fourth Amendment); *with, United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976) (contra); *compare United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971) (use of flashlight is not a search within the meaning of the Fourth Amendment); *with, People v. Smith*, 42 N.Y. 2d 961 (1977) (contra). The Second Circuit itself has acknowledged that the use of a telescope to view an apartment is a search within the meaning of the Fourth Amendment. *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980).

already interpreted *Walter* in a contrary manner and has held that *Walter* applies even when a second search uncovers no more than what a first, lawful, search has already uncovered. *People v. Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980).* Here, moreover, the subsequent search in the government laboratory revealed precisely what was not accessible to the "casual observer" in Dr. Buettner-Janusch's laboratory, namely, the composition of the chemicals.**

This Court should grant certiorari in order to review this fundamental misunderstanding of the principles enunciated in *Walter* and also to give guidance on the more general question of when an augmentation of the natural senses amounts to a separate search.

IV.

THE REFUSAL TO SUPPRESS THE FRUITS OF SURREPTITIOUS INTERVIEWS CONDUCTED IN THE ABSENCE OF COUNSEL RAISES IMPORTANT ISSUES, ABOUT WHICH THERE ARE CONFLICTING DECISIONS, CONCERNING THE RIGHTS OF THOSE UNDER INVESTIGATION WHO EXPRESS A DESIRE FOR THE ASSISTANCE OF THEIR LAWYERS AND THE CORRESPONDING OBLIGATION OF GOVERNMENTAL ATTORNEYS TO RESPECT THESE EXPRESSED DESIRES.

While government attorneys were leading Dr. Buettner-Janusch to believe that they would respect his expressed desire

*Justice Rehnquist has recently granted the state's application for a stay of the California Court's mandate because he found the issues raised by that case sufficiently important to make it likely that four Justices would vote to grant certiorari. 28 Cr.L. 4189 (Feb. 11, 1981).

**As an alternative ground, the Court of Appeals found that the same unstated implied consent by Macris and Jolly that authorized entry into the laboratory also authorized the government agents to subject the chemicals to analysis in a government laboratory. This conclusion warrants the Court's review for the reasons already stated in Point I above. In addition, with regard to the analysis of the chemicals stolen by Jolly, it is especially anomalous to allow the consent of those who stole substances to justify a further and much more substantial intrusion.

for the assistance of his retained counsel, they were at the same time directing informants surreptitiously to elicit statements from him in the absence of counsel. In doing so, these government officials made meaningless Dr. Buettner-Janusch's right to the assistance of his counsel.

In *Massiah v. United States*, 377 U.S. 201 (1964), this Court held that it was unlawful for the Government to conduct surreptitious interviews of a defendant in the absence of his retained counsel. *See also, United States v. Henry*, - - U.S. - -, 65 L.Ed.2d 115 (1980). The District Court held *Massiah* inapplicable because the interrogation here took place prior to indictment (App. 50). In *Miller v. California*, 392 U.S. 616, 624 (1968), four Justices, dissenting from a dismissal of certiorari, described the contention that *Massiah* does not apply prior to indictment as being "patently without substance". There is substantial authority holding that *Massiah* does apply prior to indictment.*

Even if Dr. Buettner-Janusch did not have a right to have appointed counsel under the Sixth Amendment prior to indictment, he had a right under the Due Process Clause of the Fifth Amendment to hire his own lawyer to assist him during the investigative stages of this case. *Chandler v. Fretag*, 348 U.S. 3, 9 (1954); *House v. Mayo*, 324 U.S. 42, 46 (1945). The Government should not be allowed to use informers to bypass counsel and to deprive Dr. Buettner-Janusch of a fair chance to obtain advice when he most needed and wanted it. Justice (then Judge) Stevens wrote in a dissenting opinion what is surely the correct view:

> In a civil context I would consider this behavior [interviewing a defendant in the absence of known counsel] unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the Due Process Clause of the

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*See *United States v. Durham*, 475 F.2d 208, 210-11 (7th Cir. 1973); *United States v. Holmes*, 452 F.2d 249, 269 (7th Cir. 1971) (Stevens, Cir. J.), *cert. denied*, 407 U.S. 909 (1972); *United States ex rel. Chabonian v. Liek*, 366 F.Supp. 72, 78-80 (E.D. Wis. 1973); *People v. Hobson*, 39 N.Y. 2d 479 (1976) (Breitel, CJ.); Kamisar, *Brewer v. Williams, Massiah and Miranda: What is Interrogation? When Does it Matter*, 67 Geo. L.J. 1, 81 (1978).

Fifth Amendment. *United States v. Springer*, 460 F.2d 1344, 1355 (7th Cir. 1972).

By interrogating Dr. Buettner-Janusch in the absence of his retained counsel, government lawyers violated their obligations under D.R. 7-104(A)(1) of the Code of Professional Responsibility.* The courts have reached conflicting conclusions as to whether interrogation in violation of professional ethics requires the suppression of the statements.** The Tenth Circuit, we believe, states the correct rule which conflicts with the rule announced by the District Court in this case:

> "[O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant *may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview* which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics." (Emphasis supplied). *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) *cert. denied*, 412 U.S. 932 (1973).

In addition, the decision below has created a conflict with the highest court of New York State, which has recently found a violation of Disciplinary Rule 7-104(A)(1) requiring suppression when state officials interviewed a person in the absence of his known counsel even though that person was neither in custody nor under indictment. *People v. Skinner*, 52 N.Y.2d 24 (1980). Although the statements in that case were suppressed as a matter of state law, nonetheless, we believe that lawyers practicing in the same state should not be

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*Quoted at p. 14, *supra*.

***E.g.*, *compare United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973) (stating suppression would be required); *United States v. Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972) (Weinfeld, J.) (accord); *United States v. Howard*, 426 F.Supp. 1067 (W.D.N.Y. 1977) (accord); *with United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973) (contra).

faced with conflicting pronouncements concerning their obligations under a code of professional responsibility which is supposed to govern their professional conduct whether they are practicing in federal or state courts. See Opinion No. 160 of the New York State Bar Association (October 9, 1970).

We urge this Court to grant certiorari to resolve the conflict in the law as to the lawfulness of surreptitious interrogation under the direction of government attorneys in the absence of known retained counsel.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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